No. 83-1124

IN THE

Supreme Court of the United States

October Term, 1983

NATIONAL COMMITTEE and NATIONAL EXECUTIVE COMMITTEE OF THE NATIONAL CAUCUS OF LABOR COMMITTEES,

Petitioners,

against

ROBERT MORGENTHAU, DISTRICT ATTORNEY OF NEW YORK COUNTY, and HAROLD WILSON, ASSISTANT DISTRICT ATTORNEY OF NEW YORK COUNTY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondents
One Hogan Place
New York, New York 10013
(212) 553-9310

MARK DWYER
DONALD J. SIEWERT
Assistant District Attorneys
Of Counsel

Counter-Statement of Questions Presented

1. May a federal District Court summarily dismiss a civil rights complaint seeking to enjoin a state Grand Jury investigation, when the complaint fails to set forth specific facts showing that the investigation is unconstitutional?

The United States Court of Appeals for the Second Circuit answered this question in the affirmative.

2. Is a federal judge required to recuse himself on a motion for recusal by a party before him, when the party alleges that it has publicly disputed his personal and judicial integrity and campaigned for his impeachment because of his conduct of another proceeding, but the judge himself is unaware of the alleged attacks?

The Honorable George C. Pratt of the United States Court of Appeals for the Second Circuit answered this question in the negative.

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Preliminary Statement

Petitioners seek a Writ of Certiorari to review an order entered October 11, 1983, by the United States Court of Appeals for the Second Circuit. By that order, the Court of Appeals affirmed an order entered April 13, 1983, in the United States District Court for the Southern District of New York (the Honorable Vincent L. Broderick, D. J.). The District Court's order denied petitioners' motions

for a temporary restraining order and a preliminary injunction and dismissed their complaint for failure to state a claim. Petitioners had sought to enjoin a New York County Grand Jury investigation into possible criminal offenses relating to the printing and distribution of a publication entitled *Profiles of the Times.*

Statement of the Case

A. The Commencement of the Grand Jury Investigation

On Saturday, October 23, 1982, unidentified persons distributed a twelve-page tabloid entitled *Profiles of the Times,* for insertion into the next day's Sunday *New York Times.* The tabloid was printed on paper and used typefaces similar to those of the *New York Times Book Review.* It contained fraudulent articles of a scurrilous nature about public officials, candidates for political office and other persons, as well as photographs of those same individuals and fraudulent advertisements. Some 7,000 copies of this publication were allegedly distributed in Manhattan and Queens.

Shortly thereafter, a New York County Grand Jury commenced an investigation into possible criminal offenses related to the printing and distribution of *Profiles of the Times,* and a warrant issued authorizing the search of premises occupied by PMR Printing Co., Inc. ("PMR"), in Manhattan. On the instructions of a New York County Assistant District Attorney, police officers who executed the warrant served subpoenas on twenty-three persons found on the premises who were or appeared to be employees or officers of PMR. Nine of the persons served are allegedly

members of the National Committee and National Executive Committee of the National Caucus of Labor Committees ("the NCLC").

B. The NCLC's Motion to Intervene, Quash the Subpoenas and Enjoin the Investigation

On December 2, 1982, the NCLC moved in New York State Supreme Court to intervene in the Grand Jury proceedings, on the grounds that it was a real party in interest. The NCLC also moved to quash the subpoenas and to enjoin the Grand Jury investigation, on the grounds that the Grand Jury was being abused by the District Attorney and others in a bad-faith attempt at political harassment.

The NCLC's motion to intervene was denied on December 7, 1982.*

C. The Proceedings on the Instant Complaint in the District Court

1. The Complaint

On March 25, 1983, the NCLC filed the instant complaint. The NCLC alleged that the Grand Jury investigation had been undertaken in bad faith, for purposes of harassment and without a reasonable possibility of obtaining a conviction. The NCLC charged that respondents undertook the investigation to retaliate against the NCLC for exercising its constitutional rights and to deter the NCLC and its

* The Appellate Division affirmed the Supreme Court's ruling on June 23, 1983, two months after the dismissal of the NCLC's federal complaint. 95 A.D.2d 714. The New York Court of Appeals dismissed the NCLC's motion for leave to appeal. 60 N.Y.2d 652.

members from exercising their rights. The NCLC also charged respondents with disseminating the results of the investigation to third parties who are political opponents of the NCLC, for use in civil litigation against the NCLC. Finally, the NCLC alleged that the Grand Jury had no jurisdiction over the subject of its investigation, and that respondents lacked legal authority for their actions (A18-42*).

The NCLC requested a declaratory judgment and an order permanently enjoining the Grand Jury investigation (A42). In addition, the NCLC moved for a preliminary injunction and a temporary restraining order staying the Grand Jury proceedings.

2. Respondents' Affidavit and Memorandum of Law in Opposition to the Motion for a Temporary Restraining Order

Assistant District Attorney Harold J. Wilson submitted an affidavit and memorandum of law in opposition to the NCLC's motion for a temporary restraining order. Assistant District Attorney Wilson stated in his affidavit that the Grand Jury was investigating crimes including forgery, criminal possession of a forged instrument, possession of forgery devices, criminal simulation, conspiracy, and unspecified violations of the New York General Business Law. On behalf of both respondents, Assistant District Attorney Wilson denied that the NCLC and its members were targets of the investigation, that the investigation had been initiated in bad faith and had no chance of success, that it was designed to harass the NCLC and deter the exercise of political

* Parenthetical references preceded by 'A' are to the Appendix to Petition for a Writ of Certiorari.

rights, and that information generated in the investigation was being leaked to private persons for use in civil litigation.

In their memorandum of law, respondents argued that a temporary restraining order should be denied because (1) the NCLC lacked standing to bring its action, (2) the NCLC was precluded by the New York Supreme Court's ruling from maintaining its claim of bad faith, and (3) the NCLC had failed to show either irreparable harm or a likelihood of success in establishing bad faith.

3. The Court's Findings

On April 8, 1983, after argument by counsel for both sides, the NCLC's motions were denied and the complaint was dismissed. It was agreed at the outset of this colloquy that *Profiles of the Times* had in fact been disseminated and that the Grand Jury was investigating a complaint about it. With respect to the NCLC's claim of bad faith, Judge Broderick stated to counsel for the NCLC:

> Well, now, Mr. Anderson, I have been over your papers very carefully and they make wide ranging claims of conspiracies between Mr. Morgenthau and the New York Times, Mr. Cohn, Mr. Kissinger, the JDL, the ADL, that had impact in New York, in Maryland, in the Middle East, I guess in Washington, but the only allegation I find in all of your papers with respect to any activity by Mr. Morgenthau's office, by the New York District Attorney's office and by the grand jury was that Mr. Wilson received a letter in 1979 which he did not respond to. Otherwise, I mean this whole array that you have put forth in—I must say, the most complete complaint that I have ever read—in that whole complaint, the only thing that I see that you allege was actually done by the New York District Attorney's

> office is that Mr. Wilson was not responsive to a request for protection back in 1979.

The judge reemphasized that there was no dispute about the printing and attempted distribution of *Profiles of the Times* or about the fact that the District Attorney was investigating the incident after receiving a complaint—in the judge's words, "an entirely appropriate function" (A12). The judge also noted that the NCLC had raised no question with respect to the propriety of the subpoenas served upon its members during the search at PMR (A12).

Next, Judge Broderick found that it would be "highly improper" (A13) to interfere with the investigation, because the NCLC had demonstrated no colorable basis for interfering with it and had failed to show any probability of irreparable injury. The judge stated:

> The investigation that is going on is a grand jury investigation. It is one that may or may not result in the bringing of charges of criminal activity against one or more people. There is certainly no evidence before me at the present time that indicates that any of those grand jury subpoenas were directed to members of the plaintiff [*sic*] core members and, even if they had been, on the circumstances that are before me, it would have been quite appropriate to serve such subpoenas if those persons were involved or thought to be involved in an activity that was being investigated. . . .
>
> It would be an unhealthy situation, indeed, in my judgment, if the federal court, except in extremely unusual circumstances, interfered with a state district attorney's office and with a grand jury in the investigation of possible crime.

> In analyzing the complaint and in accepting as true for purposes of this application the allegations of that complaint, I find nothing in it that suggests any basis for intervention by this court. The complaint, as I have already mentioned, ranges widely. It covers a vast period of time and it covers activities in various areas of the globe. The very volume of the allegations in the complaint points up, in my judgment, the sparsity of those allegations which relate in any way to the District Attorney's office or which relate in any way to the investigation which is currently under way. This is not a situation where the District Attorney is conducting an investigation where there has been no wrongdoing and where there has been no complaint about wrongdoing. There has been wrongdoing in that a publication has been circulated under false pretenses and there has been a complaint about that wrongdoing.
>
> I can envision no untoward consequences to the plaintiff in this action by that investigation continuing and I can see, therefore, no basis upon which preliminary relief would be justified (A13-14).

Finally, the judge went on to note "a convergence of the relief that is asked for in this complaint," that is, that the NCLC was seeking to enjoin the investigation permanently as well as preliminarily, and he ruled that given his denial of the NCLC's application for a temporary restraining order and a preliminary injunction, it was appropriate to dismiss the complaint altogether (A14). The judge stated to counsel for the NCLC:

> [M]y finding is that while for the purposes of this motion I have found that you had standing, your entire complaint here is that an improper investigation is going on and that you have been irreparably injured. I am finding that there has not been a showing that the

investigation is improper. I then went on and made a finding on irreparable harm with the thought that if the Court of Appeals found I was wrong on the finding preliminary to that, that it would also have my finding with respect to irreparable harm in the event that I was wrong, but ultimately my finding is that the allegations in your complaint do not state a cause of action and I dismiss the complaint (A16-17).

D. The Court of Appeals Decision

In an informal opinion, the Court of Appeals held that the District Court had properly dismissed the complaint. The Court wrote:

> It is well settled that a complaint is subject to dismissal if it appears to a certainty no relief can be granted under any set of facts that can be proved in support of its allegations. *Conley* v. *Gibson*, 355 U.S. 41, 45 (1957). *See also Koch* v. *Yunich*, 533 F.2d 80, 85 (2d Cir. 1976) ("Complaints relying on the civil rights statutes are plainly insufficient unless they contain some specific allegations of fact indicating a deprivation of civil rights, rather than state simple conclusions.")....
>
> First, with respect to the showing of irreparable harm, appellants have made only conclusory allegations that the investigation "will cause . . . irreparable harm and function solely to chill plaintiffs in the exercise of their Constitutional rights." There is no indication, in either the complaint or supporting affidavits, of a factual basis for these allegations.
>
> In addition, appellants' complaint fails to state a cause of action. As the Supreme Court has stated, "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases." *Younger* v. *Harris*, 401 U.S. 37, 42 (1971). There is

no basis, in the case at bar, for suggesting that appellants are the targets of the investigation; in fact, neither has ever been subpoenaed. Moreover, appellants' allegations that the investigation was brought in bad faith and for purposes of harassment are stated in mere conclusory terms, without any factual support.

We acknowledge that, under the *Conley* v. *Gibson* standard, a *sua sponte* dismissal under Rule 12(b)(6) should be scrutinized with the utmost care. Even under liberal pleading rules, however, the complaint is clearly insufficient. No matter what set of facts the appellants may ultimately prove in support of its allegations, we believe that it will not suffice to satisfy the usual equitable tests (A2-3).

Reasons for Denying the Writ

1. This case presents no question worthy of this Court's review. Petitioners raise no claim which involves unsettled principles of law or a conflict among the lower courts.

In *Conley* v. *Gibson*, 355 U.S. 41 (1957), this Court held that a federal complaint is properly dismissed where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. The Court of Appeals applied this rule, citing *Conley* v. *Gibson*, in affirming the dismissal of petitioners' complaint on the ground that it fails to state a cause of action. This case accordingly does not involve any issue concerning the standard for determining the sufficiency of a complaint, but turns merely on the Court of Appeals' application of that standard to petitioners' particular complaint.

Petitioners may be attempting to suggest that a more significant question is presented when they analogize their situation to that of the plaintiffs in *Ealy* v. *Littlejohn*, 569 F.2d 219 (5th Cir. 1978) (Petition, pp. 11-13), but that suggestion would be untenable. In *Ealy* v. *Littlejohn*, the plaintiffs, members of a black citizens association, sought to enjoin a Grand Jury investigation which the plaintiffs charged had been undertaken in bad faith to retaliate for their public criticism of a prior investigation into the homicide of a young black. To support their claim of bad faith, the plaintiffs alleged a wealth of specific facts: that the Grand Jury had reconvened after they circulated their criticism and subpoenaed all officers of the association, as well as its records and minutes; had questioned members and officers about the association's membership, meetings, and financial affairs; and had referred its report to prosecutors and state tax officials for "appropriate action." 569 F.2d at 223-24. These allegations were held sufficient to state a claim to injunctive relief.

In this case, by contrast, the complaint alleges only one specific fact linking the Grand Jury investigation to the NCLC, namely, that police officers went to PMR and served subpoenas on nine employees who are members of the NCLC. That fact does not tend to show that respondents undertook the investigation of counterfeit printed matter to harass the NCLC or retaliate for its exercise of constitutional rights. The putative support for petitioners' claim of bad faith is otherwise found mostly in the Steinberg affidavit (A56-81). But the statements in that document, almost all attributed to anonymous "confidential sources," are irrelevant, conclusory, and wholly speculative with re-

spect to respondents' motives in the investigation, and it cannot be disputed that the courts below properly rejected them as a basis for enjoining the investigation. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1216, pp. 120-25 (1969).

In short, this case is not at all like *Ealy* v. *Littlejohn*, and the distinction between these cases does not suggest that there is a question of what standard should be applied in evaluating the sufficiency of petitioners' complaint. Rather, the distinction lies in the simple fact that petitioners have not sufficiently alleged bad faith. Petitioners' elaborate arguments and multiple citations cannot disguise that fact. In essence, petitioners ask this Court to examine their complaint once again and find what two lower federal courts and the New York state courts have been utterly unable to find. It would not serve the purposes of certiorari to accept that invitation. Supreme Court of the United States Revised Rules, Rule 17; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Petitioners' second issue calls for the same comment. A motion to recuse under 28 U.S.C. §455 inevitably turns on the facts and circumstances of the particular case. The motion is addressed to the discretion of the sitting judge, and if he denies it, his action is reviewable only for clear error or abuse. *See, e.g., United States* v. *Miranne*, 688 F.2d 980, 985 (5th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 736 (1983); *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101, 1111-12 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). In this instance too, petitioners raise no issue concerning the standard to be applied in resolving their claim that Judge Pratt should have recused himself;

they merely assert that the judge's impartiality could reasonably have been questioned in light of their alleged attacks upon him after the Abscam trials (Petition, pp. 18-19). This claim depends on the particular facts of this case and does not assume the significance which would warrant this Court's review.

To be sure, Judge Pratt's decision may not be reviewed if this Court chooses not to review it (*see* Petition, p. 20), but this fact does not alter the essentially particularized nature of petitioners' claim. Nor should it cause concern, because petitioners cannot claim that Judge Pratt treated them unjustly. Even harsh attacks on a judge's integrity should not be presumed to compromise his impartiality; and there is no reason to fear that Judge Pratt was in fact biased, given his unchallenged statement that he had not recognized petitioners before they moved to recuse him, had been unaware of petitioners' attacks, and was not influenced by them. On this record, the notion that Judge Pratt was biased against petitioners, or that his impartiality might reasonably be questioned, is frivolous.

2. Even if the questions petitioners present were worthy of review, the writ should still be denied, because a procedural barrier precludes the federal courts from entertaining petitioners' complaint. The allegations in petitioners' federal complaint are virtually identical with those the NCLC submitted when it moved the New York Supreme Court to intervene, to quash the Grand Jury subpoenas, and to enjoin the investigation.* In summarily denying the NCLC's motion to intervene, the New York court neces-

* The NCLC's state-court motion and supporting affidavits were included as exhibits in the record before the District Court.

sarily found these allegations insufficient to state a claim to relief.* In New York, a dismissal for failure to state a claim bars a second action based on the same allegations. *See* D. Siegel, *New York Practice* (1978), pp. 332-33, 590-91; *Flynn* v. *Sinclair Oil Corp.*, 20 A.D.2d 636 (1st Dept.), *aff'd without opinion*, 14 N.Y.2d 853 (1964). Because the denial of petitioners' motion to intervene was the equivalent of a judgment dismissing for failure to state a claim, it must be given preclusive effect in a federal proceeding. *Allen* v. *McCurry*, 449 U.S. 90, 94-105 (1980); *see also Migra* v. *Warren City School District Board of Education*, —— U.S. ——, 52 U.S.L.W. 4151, 4153 (January 23, 1984); *Kremer* v.

* The Appellate Division's opinion affirming the Supreme Court's denial makes explicit the findings which were implicit in the lower court's summary action:

> The motion by the National Caucus of Labor Committees (NCLC) to intervene was also properly denied. The NCLC has demonstrated no "real and substantial interest" in the Grand Jury investigation to justify a proposed intervention (see *Matter of Grand Jury*, 619 F2d 1022, 1026-1027). The allegations by NCLC that the Grand Jury is investigating in bad faith, that it (the NCLC) is the target and that the investigation infringes on its members' associational rights, are wholly conclusory. They do not warrant even a hearing since they are not substantiated by credible, particularized allegations tending to show that they are true. The affidavit submitted in support of the motion contains hearsay, irrelevancies and conclusions. It states no specific facts which fairly support the NCLC's assertion that the Grand Jury investigation was undertaken in bad faith, or that the investigation was designed to infringe on the associational rights of any member of the NCLC. The witnesses herein were called *solely* because they worked for PMR. As noted, the instructions given to the police by the District Attorney left the police no discretion as to who should be served. The fact that nine of the witnesses are members of NCLC was not an issue before the proposed intervenor itself disclosed it. The NCLC's lack of standing to intervene also mandates rejection of its claim that it may move to quash the subpoenas, since both claims are based on its ability to establish an interest in this case and it has failed to do so. 95 A.D.2d at 716.

Chemical Construction Corp., 456 U.S. 461, 466-67 (1982); *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §§4439, 4469, pp. 354, 659-60 (1981).

Conclusion

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

MARK DWYER
DONALD J. SIEWERT
Assistant District Attorneys
Of Counsel

March 5, 1984